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Foreign Investors Required to Prove to FIRB that Agricultural Land was "Widely Marketed"

In a Nutshell

In addition to the Government's recent announcement that the purchase of electricity assets by foreigners will be closely monitored and attract conditions (see our previous client alert for further information), the Government has also announced that foreign purchasers will not be permitted to purchase agricultural land unless the land was widely marketed for a minimum of 30 days. This initiative is likely to be detrimental to development in the renewable energy sector for a number of reasons discussed below.

New "tough rules" surrounding agricultural land purchases by foreign investors

On 1 February 2018, Treasurer Scott Morrison announced the Turnbull Government's introduction of "tough new rules" aimed at ensuring Australians competing against foreign purchasers have ample opportunity to purchase agricultural land.

The rules have been implemented through new policies and guidelines which are to be applied by the Foreign Investment and Review Board (**FIRB**) when considering applications for the purchase of agricultural land by foreign purchasers.

Foreign investors seeking approval for the purchase of agricultural land from FIRB will be required to prove that the agricultural land the subject of the application was "widely marketed" for a minimum of 30 days, meaning that the property was advertised on a widely used real estate website, large newspaper or other channel that Australian bidders could reasonably access.

In addition, foreign investors will be required to demonstrate that while the property was being marketed, there was an equal opportunity for other potential purchasers to acquire the land. Assumedly this is to prevent disingenuous marketing.

Exceptions

Applicants will not be required to establish that a transparent widely marketed sales process led to the purchase in question under the following circumstances:

- The applicant is purchasing the agricultural land by way of a private sale, however, the land was widely marketed within the 6 months preceding the foreign purchase (i.e. the vendor need not re-advertise if the foreign purchaser approaches the vendor within 6 months after the vendor had withdrawn advertisement); or
- The applicant is 50 percent or more Australian owned; or
- The applicant is required to purchase the land in order to comply with an Australian law.

Retrospective application

The new rules were publicly announced on 1 February 2018, however, it is likely that they will apply to acquisitions made after 1 February made pursuant to options to purchase and first and last rights of refusal rights granted, and contracts entered into, prior to 1 February 2018 given that such arrangements do not fall within any of the exemptions listed above.

Options to purchase and first and last rights of refusal rights are commonly granted to solar and wind generation developers who require considerable time to investigate whether often (agricultural) land is suitable for their intended project.

The application of the policy in this manner is extremely problematic as it could result in a peculiar situation where a foreign investor is not able to enforce its contractual rights unless the vendor advertises the interest which could lead to a third party acquiring the land rendering the vendor in breach of its contractual obligations.

It is our view that the Government needs to clarify the operation of the policy under these circumstances or more appropriately create a further category of exemption to prevent the retrospective application of this policy to pre-existing interests. Retroactive application of laws and policies is inconsistent with core principles of the Australian legal system.

Other Implications

In addition to the problems caused by potentially retrospective application, the new rules may result in foreign investors being deterred from investing in Australian agricultural land as the rules will prevent developers from acquiring interests using the standard commercial approach.

Since July 2017, FIRB has categorised developed wind farms and solar farms as developed commercial land rather than agricultural land. However, land which is yet to be developed into a wind or solar farm is still considered agricultural land (provided the land does not fit more accurately into another category e.g. vacant land) until the wind or solar farm is erected. Accordingly, the purchase or long term lease of agricultural land prior to the construction of the solar or wind farm will be captured by these new rules.

With respect to leasing, it is not clear from Morrison's announcement or from the information available from FIRB whether the new rules will apply to long term leases (i.e. leases exceeding a term of 5 years).

Although the guidance from FIRB to date centres on the purchase of land, it is clearly arguable that the policy would also apply to long-term leases. Foreigners are already required to list their interests in long term leases of agricultural land on the Foreign Ownership of Agricultural Land Register.

Given that a significant amount of developers in the energy sector (in particular the renewable energy division) rely on securing long term leases of agricultural land which they have carefully selected (and which commonly was not land in which the landowner was intending to lease until presented with the opportunity), the new rules could significantly hinder development in the field.

Conclusion

The Government's shift in policy raises a number of questions that must be answered. In absence of this clarification, foreign companies may be deterred from investing in Australia within the energy sector and beyond.

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